UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

AMERICAN BEST, LLC d/b/a
GOETTL AIR CONDITIONING[1]

Employer

and **Case 28-RC-6174**

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, LOCAL UNION 359, AFL-CIO[2]

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks an election within a unit comprised of approximately 33 employees engaged in the custom fabrication, installation and service of heating, ventilating and air conditioning (HVAC) equipment for the Employer. The unit consists of commercial technicians, residential diagnostic technicians, installation technicians, and metal custom fabrication employees employed out of the Employer's facility located in Phoenix, Arizona. The Employer initially contends that an election among its employees is premature as their operations began only 11 days prior to the petition being filed. The Employer further contends that the only appropriate bargaining unit should consist of all employees employed at the Employer's facility, excluding office clerical, managers, and supervisors as defined in the Act. The unit proposed by the Employer consists of about 50 employees.

For the reasons discussed below in detail, I conclude that the petition is timely and an election may be conducted among certain employees because the Employer now employs a substantial and representational complement of employees. In addition, based upon such factors as common supervision, the degree of similar training, skills, job functions, and the established history of collective bargaining, I also conclude that the petitioned-for unit is appropriate. The unit need not include the other classifications the Employer seeks to include as those classifications are not significantly involved in the installation and service of equipment at the premises of the Employer's customers, and the employees in those classifications have little and infrequent interaction with the petitioned-for employees, with the exception of the custom fabrication employees, whom I am including in the unit.

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[1] The name of the Employer appears as stipulated at the hearing.
[2] The Petitioner's name is corrected, sua sponte, to reflect its full and proper name.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The parties stipulated, and I find, that the Employer, America Best, LLC d/b/a Goettl Air Conditioning, an Arizona corporation, maintains an office and place of business in Phoenix, Arizona, where it is engaged in the business of fabricating and installing heating and air conditioning equipment. During the current calendar year, in the course and conduct of its business operations, the Employer anticipates deriving gross revenues in excess of $500,000. During this calendar year, to date, the Employer has purchased goods, materials, and supplies valued in excess of $50,000 directly from suppliers located outside the State of Arizona. I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purpose of the Act.

3. **Claim of Representation:** The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. **Statutory Question:** The petition was filed on April 25, 2003, 11 days after the Employer assumed control of Goettl Air Conditioning, Inc. (Goettl), the former employer at the facility. The Employer purchased over half of the assets of the former employer, leased the same facility used by Goettl, and has essentially continued the operations in the same manner as the former employer, though the Employer contends it will change some operations in the future by combining some facets of the operation and diminishing certain other operations.[3] The former employer terminated all the employees and provided them the Worker Adjustment and Retraining Notification Act (WARN) notice. All employees were invited to apply for work with the Employer. The Employer has hired many of the former employees. As of the date of hearing, these included a total of 50 employees, approximately 31 of whom had worked in the petitioned-for unit. By the end of June 2003, the Employer planned to hire a total of about 15 to 20 more employees divided between those in the petitioned-for bargaining unit employee and its other employees. The Employer was in full production as of May 21, 2003. The election ordered herein will occur in July 2003.

The Employer contends that the petition should be dismissed as premature because the Employer has not had the opportunity to finalize and/or implement many of its plans for its operations and that it intends to cross-train employees between classifications in the future. Based upon the Board case law, I am of the view that the Employer's contentions lack merit.

In *Endicott Johnson de Puerto Rico*, 172 NLRB 1676, 1677 fn. 3 (1968), the Board made a distinction between contract bar cases and non-contract bar cases, the latter situation being

[3] The Employer will not manufacture portable evaporative coolers, gas products, split systems or air handlers, which were part of the former employer's operations.

presented here. The test in non-contract bar cases is whether the present complement of employees is substantial and representative. There is no flat rule in making that determination. The Board generally considers one or more of the following factors: 1) The size of the employee complement just prior to the date of issuance of the Board's decision. See *Celotex Corp.*, 180 NLRB 62 (1970); *Bell Aerospace Co.*, 190 NLRB 509 (1971); *St. John of God Hospital*, 260 NLRB 905 (1982); 2) Whether the projected additional jobs merely involve distinct operations rather than separate and distinct job classifications in terms of types of skills required of the employees. If no significantly different functions are to be fulfilled or no significantly different skills are required, the Board will find the "substantial and representative complement test satisfied. See *Frolic Footwear*, 180 NLRB 188 (1970); *Redman Industries*, 174 NLRB 1065 (1969); *Revere Copper & Brass*, 172 NLRB 1126 (1968); and 3) The rate of expansion of the unit. *Gerlach Meat Co.*, 192 NLRB 559 (1971); *Key Research & Development Co.*, 176 NLRB 134 (1969). In addition, the Board will look at the employer's projected plans and will not dismiss the petition where the employer's plans are mere speculation or conjecture. See *General Engineering*, 123 NLRB 586 (1959); *Meramec Mining Co.*, 134 NLRB 1675 (1962); *Pullman, Inc.*, 221 NLRB 954 (1975).

Applying these factors, I find that the size of the employees complement is considerable. There were 31 employees in the petitioned-for unit as of the date of the hearing, with plans to hire an additional 15 to 20 employees for its entire operation by the end of June 2003. Second, the new hires will *not* be placed into separate job classifications distinct from those currently used by the Employer. Rather than add additional classifications of employees, the Employer will merely cross-train some employees, and transfer its operations to a new facility, though no facility had been purchased as of the hearing date. Third, by the date of the election herein, the Employer will have hired its entire complement of employees assuming that it adheres to its stated hiring plans. Based upon these facts, I find that there was, as of the hearing date, a substantial and representative complement of employees present, and I will not dismiss the petition as being premature. Accordingly, a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. **Unit Finding:** The primary issue presented in this case is whether the unit sought by the Petitioner is appropriate for bargaining or should include additional classifications urged by the Employer. Additionally, the Employer contends that the metal fabrication supervisor is a supervisor within the meaning of the Act and should be excluded from the collective-bargaining unit. I have concluded that the petitioned-for unit is appropriate, and that the metal fabrication supervisor is a supervisor within the meaning of the Act. To provide a context for my discussion of these issues, I will first provide the representation case history involving this Employer facility, an overview of the Employer's operations, followed by a description of the employee complement and their working conditions, and the production and installation process. I will also describe the authority of the metal fabrication supervisor. I will then present in detail the case law and the reasoning that supports my conclusions on these issues.

A. Background

The Employer began its business operations on April 14, 2003, after purchasing a majority of the assets of the former employer, Goettl. The Petitioner was the representative of two separate collective-bargaining units employed by Goettl. The first unit, identified for the purposes of this decision as the contracting unit, consisted of:

> All employees engaged in but not limited to the: (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air-handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining: (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches whether manual drawn or computer assisted used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; (e) metal roofing; and (f) all other work included in the jurisdictional claims of Sheet metal Workers' International Association.

The second unit, identified for the purposes of this decision as the production unit, consisted of:

> All production, plant maintenance, local truck drivers, janitors, yardmen, and plant warehouse men at the manufacturing locations, excluding all supervisors, office personnel, draftsmen, laboratory, technical employees and salesman.

The petitioned-for unit closely resembles the contracting bargaining unit listed above. The record fails to specify the period of time that the above units were represented by the Petitioner but, prior to the Employer's April 14, 2003 acquisition of the former employer, the units existed for "many years." (Petitioner's brief, page 2)

B. Employer's Operations, Hierarchy, and Working Conditions

The Employer's Phoenix facility is engaged in the manufacture and sale of packaged heat pumps and air conditioning units and contracting to install those items in residential markets with a small amount of its business in commercial markets. The Employer is engaged in the sale of the manufactured units to locations outside of the State of Arizona as well as outside the United States in nearby Mexico. The Employer provides installation and repair services solely to Arizona customers.

The Employer's facility is currently under lease with the former employer and is due to expire in September 2003. The Employer is in the process of attempting to acquire another building near their current leased building in the event that it moves the operation after the lease expiration.

The highest-ranking member of management is the Chairman and Chief Executive Officer, Don Burke. The following four management personnel report to Burke: John Ryan, the

Vice President and General Manager for Manufacturing & Distribution; Jason Fairfield, Vice President and Chief Financial Officer; Al Da Rosa, Technical Consultant to Burke; and Brad Morari, Vice President and General Manager of Contracting.

The Employer divides its organizational structure into three distinct groups of employees. The first group is the production group, identified as the manufacturing and distribution side of the business, that includes all fabrication, maintenance, parts, stockroom and manufacturing activities. This production group performs the vast majority of its work in the Employer's facility under the direction of John Ryan and Dennis Ostrowski, Director of Operations. Within the production group are the metal fabrication employees, working under the direction of Gary Jones, the metal fabrication supervisor. The second distinct group is called the "contracting group" and is identified as the installation and service side of the business that includes residential HVAC service technicians, commercial HVAC technicians, and residential HVAC installation technicians. The contracting group is under the direction of Brad Morari. The third distinct group of employees is involved in the financial aspects of the Employer such as accounting, costing, payroll, and other financial support services. Both parties agree that these employees should be excluded from any appropriate bargaining unit.

All employees working out of the Phoenix facility receive the same fringe benefits, are granted the same holidays off, have the same vacation and leave policy, and are subject to the same employee handbook policies. The record testimony shows insignificant interaction between the petitioned-for classifications, except for custom fabrication employees and the production group employees involved in the manufacture of systems for the Employer.

C. Classifications Undisputedly Included in the Unit

The parties agree as to the inclusion of certain classifications in the bargaining unit. Each classification involves technicians who regularly install, service, and construct heating and air-conditioning units at customer facilities. All work in the contracting group and are supervised by contracting department supervisors, either Ken Bishop, Service Manager, Arman Ortega, Installation Manager, or Jeff Gardner, Construction Manager. Brad Morari is the overall supervisor for the contracting group. Unlike production workers, almost all of the contracting employees are provided a vehicle by the Employer to drive to customer facilities to perform their job and all are provided Employer-owned radios. All contracting employees are required to provide their own tools and are required to adhere to special rules with respect to the uniforms they must wear. Those uniform rules do not apply to the production employees. Employees in the contracting group fill out a different job application form than that used for production employees. Morari interviews contracting group applicants for employment prior to an offer of employment being extended to them. The contracting group's peak season begins on the first day that the ambient temperature reaches 100 degrees Fahrenheit and continues for several months during Arizona's hot weather period. All of the work performed by the contracting group is within the State of Arizona.

Residential and Commercial HVAC Service Technician

The record reflects that there are about 15 residential and commercial HVAC service technicians, divided into five categories: trainee, preventative maintenance, diagnostic, senior and master technician. An employee will be placed in one of the five categories based on experience and training. Commensurate rates of pay for service technicians range from $9.00 to $25.00 per hour based on experience and training.

Service technicians, who work on residential projects as opposed to new construction or commercial projects, are required to wear an Employer uniform, the cost of which is shared equally between the Employer and employee. Those service technicians whose primary job is working on new-construction residential or commercial projects, are provided an Employer T-shirt. Service technicians are required to provide their own hand tools, including diagnostic meters, gauges, cordless drills, and other tools necessary to perform their required duties. The Employer provides recovery equipment, vacuum pumps, and a torch set.

Unlike production employees, service technicians do not utilize a time clock but instead use their radios to report to their supervisors their times on jobs and completion of work. Supervisor Bishop handwrites service technicians' time sheets. Service technicians do not utilize the break room at the Employer's facility but take scheduled breaks, including lunch breaks, in their Employer-provided vehicle, while at jobs. Service technicians' work schedules are determined by the service orders received. A typical workday generally begins shortly after 7:00 a.m. and ends after 3:30 p.m. Unlike the production employees who work inside the facility, outside technicians commence an earlier workday during the hot weather period, reporting to work as early as 6:30 a.m. During the peak season of the Arizona hotter months, service technicians are required to work many hours of overtime in order to meet the increased demand for their services. Service technicians may interact with the production group employees a total of about 30 minutes per day but only if they need assistance in loading equipment or materials onto their vehicle or need to return a used unit to the Employer's facility. Several of the service technicians take their Employer-provided vehicles home after completion of their workday.

Installation Technicians

There are approximately 16 residential and commercial installation technicians who are divided into four categories: trainee, assistant, technician, and senior technician. An employee will be placed in one of the four categories based on experience and training. Commensurate wage rates for installation technicians range from $9.00 to $22.00 per hour based on experience and training.

All installation technicians are required to wear Employer uniforms, the cost of which is shared equally between the Employer and employee. Those installation technicians whose primary job is working on new-construction residential or commercial projects are provided an Employer T-shirt. Installation technicians are required to provide their own hand tools, including diagnostic meters, gauges, cordless drills, and those tools necessary to perform their required duties. The Employer provides specialty tools as necessary. Those specialty tools may

include, but are not limited to, recovery equipment, vacuum pump, torch set, reciprocating saw, chain saw, extension cords, generators, piping threading equipment, lifts, and ladders.

Like the service technicians, installation technicians do not utilize a time clock but instead use their radios to report to supervisors their status of being on a job or completing a job. The installation supervisor, Ortega, handwrites the time sheets of the installation technicians. Installation technicians do not utilize the break room at the Employer's facility but take their scheduled breaks, including lunch breaks, in their Employer-provided vehicle while at a job. The installation technicians' work schedules are determined by the installation orders received, but a typical workday begins after 7:00 a.m. and ends after 3:30 p.m. During the extreme hot weather period, they begin work as early as 6:30 a.m. Like the service technicians, installation technicians work many more hours of overtime during hot weather. Installation technicians may interact with the production group employees a total of about 30 minutes per day but only if they need assistance in loading equipment or materials onto their vehicle or need to return a used unit to the Employer's facility. Several of the installation technicians take their Employer-provided vehicles home after completion of their workday.

D. Disputed Classifications

The Employer contends that the bargaining history between the prior employer and Union should not be adhered to and any unit found appropriate herein must include a number of classifications that were historically excluded. Those classifications include all production group employees as well as employees involved in production fabrication work. The Petitioner opposes the inclusion of these additional classifications in the bargaining unit, with the exception of the custom fabrication employees. The Petitioner notes that custom fabrication employees, under the predecessor employer, were historically included in the petitioned-for bargaining unit as the custom fabricators, unlike production fabrication employees, frequently worked outside the Employer's facility delivering custom fabricated material to the Employer's outside projects.

Production group employees, unlike the employees in the petitioned-for contracting group, do not wear special uniforms, are not provided Employer vehicles, and are not required to provide their own tools. Applicants for production jobs are required to complete a questionnaire not used by the Employer for applicants for contracting group jobs. Director of Operations Ostrowski makes the final decision on the hiring of applicants for the production group. Unlike the contracting group employees, the peak season for work performed by production group employees begins in the cooler months of January or February. Production employees work 7:00 a.m. to 3:30 p.m. and their work hours do not change during extreme hot weather, as do the hours of the contracting group employees. Production group employees produce materials that are shipped to states outside the State of Arizona and to Mexico.

Metal Fabrication

There are six employees identified as fabrication employees. These employees are divided into two categories: custom and production. Petitioner seeks to represent the two custom fabricators and not the four production fabricators.

The custom fabricators work at the Employer's facility, but leave the facility to deliver fabricated items to the contracting unit at customer facilities. Custom fabricators manufacture custom or specialty items such as specialty ductwork custom elbows, fittings, gutters, downspouts, and other items needed to support construction work. The custom fabricators also make products sold to third-party distributors, though this accounts for only five percent of their production. Due to the more specialized nature of their work, as opposed to the routine nature of production fabricators, custom fabricators are far more skilled and have more experience than production fabricators.

The four production fabricators produce stock items that do not require specific measurements or custom fitting. They produce standard elbows and fittings. Most of items that production fabricators produce are items repetitively manufactured. Production fabricators rarely, if ever, have contact with the contracting group.

Currently, 60 to 70 feet separate the custom fabricators from the production fabricators at the Employer's facility. The record reflects that custom fabricators use equipment not used by the production fabricators, including a snap lock machine, the Pittsburgh machine, the easy edger and power and hand rolls. On occasion, a production fabricator might be asked to assist in the custom fabrication area, although generally there is very little interaction between the custom and production fabricators. The Employer asserts that it has plans to combine the work of the custom and production fabricators at some point in the future, but, as of the hearing date, the two classifications worked separately. The Employer also claims it will do some cross-training of the custom and production fabricators in the future, but, as of the hearing date, the only training that had occurred involved a single production fabricator observing for a few hours, a custom fabricator operating the Employer's plasma machine.

Production fabricator wage rates range from $11.00 to $12.50 per hour whereas custom fabricators receive wages ranging from $15.50 to $18.50 per hour. Both custom and production fabricators report to Metal Fabrication Supervisor Gary Jones, who in turn reports to Operations Director Ostrowski.

Facility and Vehicle Maintenance Team Members

There are two maintenance team members: Russ Erickson, designated as a Team Captain, and employee Orlando Carbohal. Their wages range from $11.00 to $18.50 per hour. There is evidence of Carbohal once having worked on an assignment in the field involving installation, but the record does not provide any detail regarding that incident. Maintenance team members work primarily in the Employer's facility under the ultimate purview of Operations Director Ostrowski. Prior to the Employer's April 14, 2003 acquisition of the facility and operation, one plant maintenance employee worked on forklift trucks, changed oil on machines, and serviced production equipment. That individual was employed in the production bargaining unit represented by the Petitioner. The other fleet maintenance employee worked primarily on vehicles, changing oil, servicing brakes, and was not included in either bargaining unit. The Employer contends that it has combined the classifications of the two maintenance employees and both Erickson and Carbohal work on both vehicle and plant maintenance.

Production Team Members

There are eight production team members whose wage rates range from $9.00 to $16.75 per hour. Production team members work in the Employer's facility under Team Captain Jimmy Baeza and Operations Director Ostrowski. These employees are involved in the production and assembly of equipment, including heating and air-conditioning units. Equipment produced is sold to wholesale distributors throughout the United States and Mexico. Production team members also manufacture some equipment used by the contracting group. Distribution Manager Charlie Briggs is in charge of the finished goods' inventory and transports the equipment produced by the production team members to the contracting group, when that equipment needs to be installed at customer facilities.

Stockroom and Distribution Employees

The stockroom consists of a wire cage where employees control inventories of parts and stock and issue parts for use by the manufacturing employees. Stockroom employees also process requisitions, drive forklifts to store inventory, and deposit parts in bins. There are two stockroom employees and one distribution employee with wage rates ranging from $10.50 to $12.50 per hour. Stockroom employees are under the supervision of Stockroom Manager Bill Schenk. The sole distribution employee is under the supervision of Distribution Manager Charlie Briggs. Both groups of employees fall under the ultimate purview of Operations Director Ostrowski.

E. Metal Fabrication Supervisior

The Employer contends that Gary Jones, the metal fabrication supervisor, is a supervisor within the meaning of the Act. Jones assertedly supervises two employees in the bargaining unit. The Petitioner takes no position on the issue of Jones' status. Jimmy Baeza and Russ Erickson are Team Captains in the production unit. No determination will be made with respect to their status as I find that the production unit employees are not appropriately included in the petitioned-for bargaining unit.

Jones oversees the two custom fabricators as well as the four production fabricators. Undisputedly, Jones has the authority to discharge employees, prioritize, direct, and evaluate the employees work, authorize overtime, review time cards and initial any changes, and can effectively recommend changes in employee classifications, hiring, layoffs, and wage increases.

F. Legal Analysis and Determination

Supervisory Status of Metal Fabrication Supervisor

The Employer would exclude the metal fabrication supervisor from any bargaining unit found appropriate on the basis that he is a supervisor within the meaning of the Act. Section 2(11) of the Act defines the term "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

The possession of any one of these authorities is sufficient to deem the employee invested with such authority as a supervisor. *Allen Services Co.*, 314 NLRB 1060 (1994); Big *Rivers Electric Corp*., 266 NLRB 380, 382 (1983). Persons with the power "effectively to recommend" the actions described in Section 2(11) are supervisors within the statutory definition. *Sun Refining & Marketing Co.*, 301 NLRB 642, 649-650 (1991); *Custom Bronze & Aluminum Corp*., 197 NLRB 397 (1972). "Without question, an individual who can discipline employees or effectively recommend their discipline is a statutory supervisor." *Tree-Free Fiber Co.*, 328 NLRB No. 51, slip op. at p. 4 (1999) (citing *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993); *Superior Bakery*, 294 NLRB 256, 262 (1989). The burden of proving supervisory status is on the party that alleges that it exists. *St. Francis Medical Center West*, 323 NLRB 1046 (1997). Thus, I find that the burden of establishing supervisory status lies with the Employer.

Based on the record before me, I find that Jones is a statutory supervisor. I rely on several factors. He has the authority to discharge employees and authorize overtime; he has effectively recommended applicants for hire; he has directed the work of those employees under him; and he prioritizes their workload daily, initials their time cards, and can effectively recommend wage increases. Thus, the metal fabrication supervisor is a supervisor within the meaning of the Act and, accordingly, I shall exclude him from the unit found appropriate herein. *Sun Refining & Marketing Co.*, supra; *Custom Bronze & Aluminum Corp*., supra.

Appropriate Bargaining Unit

Section 9(b) of the Act provides that "the Board shall decide in each case whether, to assure to employees fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof." It is well established under Board law that the Act does not require the unit for bargaining be the optimum, or most appropriate unit, but only an appropriate unit. *Home Depot USA*, 331 NLRB 1289, 1290 (2000); *Overnight Transportation Co.*, 322 NLRB 723 (1996). An appropriate unit insures to employees "the fullest freedom in exercising the rights guaranteed by the Act." *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), enfd. 190 F. 2d 576 (7th Cir. 1951). A union is not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1962). Furthermore, in *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971), the Board explained that when no other labor organization is seeking a unit larger or smaller than the unit requested by the petitioner, the sole issue to be determined is whether the unit requested by the petitioner is an appropriate unit. In addition, the Board will "consider a petitioner's desires relevant," although this will "not, however, obviate the need to show [a sufficient] community of interest on the facts of the specific case." See *Airco, Inc.*, 273 NLRB 348 fn. 1 (1984); *Marks Oxygen Co.*, 147 NLRB 228 (1964).

In determining whether a petitioned-for unit is an appropriate unit, the Board analyzes whether the employees share a community of interest. *Home Depot USA, Inc.*, supra, at 1290; *The Boeing Company*, 337 NLRB No. 24 (2001). In *Home Depot USA*, supra, at 1291, the Board stated that factors it considers in determining community of interest among different groups of employees include:

> [A] difference in method of wages or compensation; different hours of work; different employment benefits; differences in job functions and amount of working time spent away from the employment or plant sites…the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and history of bargaining [*Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962)]

Sharing similar duties and job functions with respect to integrated systems such as HVAC systems, along with wearing similar uniforms have been found to be meaningful factors in determining that these types of employees should be in the same bargaining unit. *Johnson Controls, Inc.*, 322 NLRB 669 (1996). In *Johnson Controls, Inc.*, a unit of installers and service technicians was found to be appropriate, where employees installed, serviced, and repaired HVAC equipment, and worked predominately in the field at customer sites rather than at the employer's premises. Id., at 670. The Board has found appropriate a unit of employees that constitute a clearly identifiable and functionally distinct group. *Brown & Root, Inc.*, 258 NLRB 1002, 1003 (1981); *S.J. Groves and Sons Company*, 267 NLRB 175 (1983); *Del-Mont Construction Co.*, 150 NLRB 85, 87 (1965).

In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. *General Electric Co.*, 107 NLRB 70, 72 (1953) As a general rule, the Board is reluctant to disturb a unit established by collective bargaining which is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. *Red Coats, Inc.*, 328 NLRB 205 (1999). "A history of inclusion in the bargaining unit for many years may be evidence that such a classification is in fact properly included in the unit." *Washington Post Co.*, 254 NLRB 168, 169 (1981)[4]; *Fraser & Johnston Co.*, 189 NLRB 142, 151 fn. 50 (1971). The rationale for this policy is to effectuate the purposes of the Act and the Board's strong interest in the stabilization of labor relations. *Red Coats, Inc.*, supra at 207. See also *Hi-Way Billboards*, 191 NLRB 244 (1971).

The Petitioner asserts that the petitioned-for unit is appropriate as the classifications therein consist of the Employer's "outside" employees who spend a majority of their work time away from the Employer's facility, servicing and installing heating and air-conditioning units at customers' residential homes and commercial facilities. The only exception to this distinction in the petitioned-for unit is those employees identified as custom fabricators. The custom fabricators spend the majority of their workday in the Employer's facility fabricating specific parts where standard parts are unsuitable. These custom fabricators frequently interact with the outside employees when delivering completed products to the customer jobsites. The custom

[4] In *Washington Post*, the Board found that it was against Board policy to include a clear statutory supervisor in the bargaining unit despite the history of collective bargaining.

fabricators' wage rates are significantly higher than the production fabricators. Significantly, the custom fabricators have, for many years, been included in the previous contracting bargaining unit with the "outside" employees. Since the Employer acquired the operations, little has changed with respect to the work of the custom fabricators.[5] In contrast, the Employer contends that a unit of just "outside" or "contracting" employees has now become inappropriate because application of normal community of interest standards mandates that the smallest unit include the entire production staff, all manufacturing and production employees, as well as service and installers.

Based upon the record described above and existing Board law, I conclude that the petitioned-for unit is appropriate. The inclusion of the production employees would be inappropriate as their contact with the contracting employees is infrequent, their work functions are dissimilar, and there is very little interchange between them. Moreover, I find that custom fabrication share a significant community of interest with the contracting employees and should be included with those in the unit found appropriate herein.

In reaching these conclusions, I rely on the significant difference in the contracting employees' working conditions from those of production employees. The contracting employees are under the overall supervision of Morari. Their work hours are different; their high season is different; they wear a different uniform; their method of arriving and departing from work is different; they do not utilize the break room; they are generally of much higher skill and experience; they work in the field with customers; all their work is for Arizona customers; prior to the Employer's April 14, 2003 acquisition of the operations; and for many years they were in a bargaining unit separate from the production employees; and they are hired using a different application and are interviewed by a different supervisor.

In contrast, production employees are under the overall supervision of Ostrowski. They use a time clock to punch in and out of work; they use the break room at the facility to take breaks and eat lunch; they do not have employer-vehicles for daily use and cannot take a vehicle home with them; their high season begins many months prior to the contracting employees; their wages tend to be lower than the contracting employees; their overall skill and experience level is lower; they work a steady shift which does not fluctuate depending on weather; and they do not interface with customers out in the field. Part of the product they produce is shipped out of state and out of the country. They have very little interaction with the contracting employees and had been in a separate bargaining unit from the contracting employees for many years. Production employee-applicants fill out a questionnaire when applying for work that contract employee-applicants do not use.

I also rely on the significantly similar working conditions that custom fabricators share with those in the petitioned-for unit. While they share some similar working conditions with

[5] Although the Employer anticipates making changes as to where the custom fabrication employees will work when they move into their own facility at the end of September 2003, the Employer provided only a sketch of a proposed operation. It has not entered into any agreement for a new facility, there were no blueprints or schematics of their proposed changes in operations in the facility, and it was unable to provide any evidence of concrete cross training that has or will take place. Its operations are substantially the same as they were during the former employer's reign.

production employees in that they often work in the facility, use the break room, and use a time clock, they are of a skill and experience level that is more akin to the contracting employees, and they support the contracting employees in that they must bring the custom parts out to the field. They assist in the installation of those items, only five percent of the customer material they produce is not used by the contracting employees, and, they are physically separated in the facility from the other production employees. Moreover, custom fabricators had been in a bargaining unit with the contracting employees for many years. The minor changes in the operations of the Employer since its acquisition of operations on April 14, 2003, are insufficient to warrant the dramatic change in bargaining unit configuration proposed by the Employer. However, with or without consideration of the history of collective bargaining, I find that the custom fabricators share such a strong community of interest with the other "outside" employees, that is, installation and service technicians, so as to warrant their inclusion in the petitioned-for bargaining unit.

The Employer has made a few changes to the former entities' operations but I conclude that the general operations have not changed in a substantial way. Moreover, there are no concrete plans to change those operations. The petitioned-for employees are performing the same jobs and in the same classifications as previously, with a few bargaining unit members having been hired as supervisors. Operations continue in the same facility as used by the former employer, with the same equipment, including vehicles and uniforms, and substantially the same seasons and hours. Ostrowski was the overall manager of the production group with the former employer and is the overall manager of the production group with this Employer. Brad Morari was the overall manager of the contracting group with the former employer and is the overall manager of the contracting group with this Employer. Although the Employer has not continued producing all of the products produced by the former employer, these changes are not so substantial as to overcome the long-standing history of collective bargaining that existed within the petitioned-for unit.

The Employer contends that because it contemplates making some changes in its operation at some future point, the bargaining history no longer has a controlling effect. While the Board has found that significant changes can affect the weight of a long history of bargaining, those changes must be substantial. See *General Electric Co.*, 121 NLRB 1193 (1959) where, as a result of reorganization, integrated plants became decentralized; and *Crown Zellerbach Corp.*, 246 NLRB 202 (1980), where a historically multi-plant unit became a single-plant unit. However, the Board has consistently refused to exclude employees from an existing bargaining unit based upon speculation as to what their duties will be in the future. In *Southwestern Bell Telephone*, 222 NLRB 407 (1976), the Board held:

> "[E]vidence that individuals actually perform the functions asserted is the only real way to determine whether they have indeed been assigned additional duties. . . . [O]ur determination must be based on what the individuals filling those classifications actually do now, as opposed to what they speculatively may be doing in the future." Ibid. at 411.

See also, *ITT Grinnell*, 253 NLRB 584, 586 (1980).

The record before me establishes that the operations have not changed significantly and that the plans for change are at best speculative. With the bargaining history and the substantial community of interest showed among the employees in the petitioned-for unit, I find that that unit is an appropriate one for bargaining. Accordingly, based on the record evidence, I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> **INCLUDED**: All full-time and regular part-time Residential and Commercial HVAC Service Technicians, including Trainees, Preventative Maintenance Technicians, Diagnostic Technicians, Senior Technicians and Master Technicians; Residential and Commercial Installation Technicians, including Trainees, Assistants, Technicians, and Senior Technicians; and Metal Custom Fabrication employees employed by the Employer at or out of its facility located in Phoenix, Arizona.
>
> **EXCLUDED**: All production, maintenance, stockroom, distribution, production fabrication employees, the metal fabrication supervisor, office clerical employees, guards, and other supervisors as defined in the Act.

There are approximately 33 employees in the unit found appropriate.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election, that will issue soon, subject to the Board's Rules and Regulations. The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 359, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the NLRB Regional Office, 2600 North Central Avenue, Suite 1800, Phoenix, Arizona, 85004-3099, on or before June 23, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in Washington must receive this request by June 30, 2003. A copy of the request for review should also be served on the undersigned.

Dated at Phoenix, Arizona, this 16th day of June 2003.

/s/Cornele A. Overstreet
Cornele A. Overstreet, Regional Director
National Labor Relations Board - Region 28

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